IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 75-6657

ANGELO BARTEMIO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Petitioner, Angelo Bartemio, respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit dismissing an appeal by Petitioner wherein a pretrial motion to dismiss an indictment on, inter alia, double jeopardy grounds was dismissed, absent requested evidentiary hearing by the District Court judge. The Court of Appeals for the Seventh Circuit absent oral argument and on motion of the Government dismissed Bartemio's appeal on April 5, 1976.

OPINION BELOW

The order of the United States Court of Appeals for the Seventh Circuit, dismissing the proceedings below, appear as Appendix "A". This appeal was dismissed on April 5, 1976. On April 13, 1976 Bartemio sought an order from the Court of Appeals for the Seventh Circuit certifying the question herein presented to this court. On April 14, 1976 the motion for certification was denied (Appendix "B").

JURISDICTION

The Judgement of the Court of Appeals for the Seventh Circuit dismissing Petitioner's Appeal was entered on April 5, 1976 (App. "A"). Petitioner's motion to certify the question to this Court was denied on April 14, 1976 (App. "B").

No petition for rehearing was filed. This Petition for Certiorari is filed within thirty (30) days of the date the appeal was dismissed (April 5, 1976). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Rule 19(1)(b) of this Court.

QUESTION PRESENTED FOR REVIEW

> "Whether in a federal criminal prosecution an appeal will lie from a pretrial denial of a motion to dismiss an indictment which is based upon, inter alia, grounds of double jeopardy?

CONSTITUTIONAL PROVISION INVOKED

Fifth Amendment to the United States Constitution:

> "No person shall be ... deprived of life, liberty or property, without due process of law...."

STATEMENT OF THE CASE

Petitioner was convicted, after trial by jury, of aiding and abetting the unlawful possession and transfer of stolen stock certificates in violation of 18 U.S.C. §659 and §2. The conviction was on May 1, 1973. Prior to trial Petitioner sought, by pretrial motion, any evidence favorable to him. The Government denied having same. Petitioner appealed his conviction and five (5) year prison term. Both were affirmed, 497 F.2d 927 (unpub. ord., 7th Cir., 1974). Petitioner commenced to serve the sentence in September, 1974. His original petition for certiorari was denied on November 11, 1974, Bartemio v. U.S., 95 S.Ct. 305 (1974).

While serving his sentence he sought a new trial. The District Court denied relief but on appeal the Government confessed error and on March 7, 1975 Petitioner was granted a new trial (unpub. ord., 513 F.2d 634, 7th Cir., 1975). The predicate for the post conviction petition and the subsequent confession of error by the Government related to the suppression of evidence concerning the main or pivotal witness against Bartemio, Maurice Harte.

Subsequently Petitioner learned that the Government had suppressed volunimous materials relative to the possession of the stolen stock certificates which were the subject of his original conviction. The certificates involved in this case were in the possession of a Government informant and were actually validated or stamped by this Government informant long prior to the time petitioner was alleged to have any contact with the same bonds. Petitioner, by pretrial motion, moved to dismiss the indictment on, inter alia, double jeopardy grounds. The Government in nowise denied the existence of extensive reports which indicated that a Government informant had played a major part in making the bonds marketable and, further, the informant's reports as they related to the bonds in question were in possession of the Government even prior to indictment. The District Court denied relief on January 9, 1976 and "took this case off his call" on January 13, 1976 to allow Petitioner to seek review from the order denying any pretrial relief relating to Petitioner's motion to dismiss the indictment.

To make a long story short the underlying fact(s) was quite simple. The bonds in this case were stolen in December, 1970 and petitioner and others were charged with possessing and attempting to sell these bonds in August, 1971. The Government had in their possession reports from an undercover informant

which related to the theft and validating of these bonds[1/]. At all times herein pertinent the reports were unknown and unavailable to the petitioner (as was the identity of the informant).

REASONS FOR GRANTING THE WRIT

THE CIRCUIT COURTS OF APPEAL ARE IN TOTAL CONFLICT ON THE QUESTION PRESENTED.

The single question presented is whether a pretrial motion to dismiss an indictment in a federal criminal case is a final appealable order where the motion is based, in part, on grounds of double jeopardy.

The Second Circuit in U.S. v. Beckerman, 516 F.2d 905 (2nd Cir., 1975) affirmed the denial of a pretrial motion to dismiss an indictment after the first trial ended in a mistrial. Inter alia, that court stated:

> "...The right will be invaded if an accused, who has properly invoked the Fifth Amendment protection against being twice put in jeopardy, is called upon to suffer the pain of two trials. Green v. United States, 355 U.S. 184, 187, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).
>
> If an accused is to be afforded "the full protection of the double jeopardy clause, a final determination of whether jeopardy has attached to the previous trial must, where possible, be determined prior to any retrial." United States v. Lansdown, 460 F.2d 164, 171 (4th Cir., 1972). Contra, Gilmore v. United States, 264 F.2d 44 (5th Cir., 1959) cert. denied, 359 U.S. 994, 79 S.Ct. 1126, 3 L.Ed.2d 982 (1959). The reasoning of the opinion in Lansdown is persuasive here. We conclude that we have jurisdiction to review the denial of the defendant's motion to dismiss the indictment on the predicate of the double jeopardy clause. This is a logical extension of the concept of appealability expressed in Cohen. United States v. Lansdown, supra, 460 F.2d at 170" (516 F.2d at 906, 7).

1/ The undercover Government informant made either daily or bi-weekly reports directly to the F.B.I. and I.R.S. under the code name of "Marco". These reports, according to the Government, deleted any mention of the petitioner albeit the reports incriminated others charged in the indictment. The reports were received by the F.B.I./I.R.S. during the time the events were occurring.

The Third Circuit has found a similar motion to be a final appealable order, U.S. v. DiSilvio, 520 F.2d 247 (3rd Cir., 1975); U.S. ex rel. Webb v. Court of Common Pleas of Philadelphia County, et al., 516 F.2d 1034 (3rd Cir., 1974). The Fourth Circuit has likewise found the pretrial motion to dismiss, where based on grounds of double jeopardy, to be a final appealable order, U.S. v. Lansdown, 460 F.2d 164 (4th Cir., 1972).

The Fifth Circuit seems to be split on the same subject because in U.S. v. Bailey, 512 F.2d 833 (5th Cir., 1975) that court dismissed an appeal by Bailey where he sought to bar retrial after the grant of a mistrial (512 F.2d at 834). However, in U.S. v. Kehoe, et al., 516 F.2d 78 (5th Cir., 1975) the court found contra. To further confuse the Fifth Circuit's position U.S. v. Dinitz, 492 F.2d 53 (5th Cir., 1974); en banc, 504 F.2d 855 (5th Cir., 1974) that court granted relief to Dinitz albeit after conviction as opposed to ruling on a pretrial motion. On further review this Court found that the Fifth Amendment did not bar the retrial of Dinitz where his original trial had been aborted because of the acts and conduct of his retained counsel, U.S. v. Dinitz, ___ U.S.___, 18 Cr.L. 3087, March 8, 1976.

The Seventh Circuit by denying petitioner relief in this case has joined the Fifth Circuit in finding that the pretrial motion to dismiss is not a final appealable order.

In the case at bar we do not have the "classic mistrial". We have a petitioner who was charged in a two (2) count indictment in 1972 and who stood trial, before a jury, in April and May, 1973. That jury acquited petitioner of an overall conspiracy to possess and transfer stolen bonds (in violation of 18 U.S.C. §371, §659) while the same jury convicted petitioner of aiding and abetting the same offense. What we suggest this realistically means is that the Government's case against this petitioner was "a close case". Our position is that but for the totally suppressed materials this petitioner might well have been totally acquitted. Prosecutorial overreaching conveys the substance of our claim. Had the Government abided by the Brady mandate and produced the report which inculpate others but do

not even mention this petitioner then, it is our position, that this petitioner may well have been totally acquitted. Now, over two (2) years after petitioner's jury trial the suppressed and hidden reports surface[2/]. Inter alia, these reports indicate that a Government informant actually had possession of these same bonds and provided the validating seal or stamp to make the same bonds marketable. This was well known to the Government prior to indictment, conviction, appeal(s) and an unsuccessful petition for review before this Court (95 S.Ct. 305).

There can be little question that petitioner had:

> "A valued right to have his trial completed by a particular tribunal" (Wade v. Hunter, 336 U.S. 684, 9; U.S. v. Jorn, 400 U.S. 470, 484-5).

If the above proposition is to be meaningful then this petitioner has forever lost his valued right, e.g., to have the original jury totally past judgement on his guilt or innocence. In the case at bar that jury was without the ability to pass TOTAL JUDGMENT ON GUILT OR INNOCENCE DUE TO THE GOVERNMENT'S SUPPRESSION OF MATERIAL EVIDENCE.

This is prosecutorial overreaching which could bar reprosecution, Cf., U.S. v. Tateo, 377 U.S. 463 at 468 ft.nt. 3; U.S. v. Jorn, 400 U.S. 470 at 486, ft.nt. 12.

The split in Circuits has been amply demonstrated and the Court of Appeals for the Seventh Circuit declined to certify the question presented to this court (App."B").

Petitioner takes the position that in this case he should not have to suffer retrial. In any event petitioner certainly should have been heard in the Court of Appeals; in accord, U.S. v. Beckerman, ante, U.S. v. DiSilvio, ante, and U.S. v. Lansdown, ante.

2/ Petitioner's counsel has yet to view these reports. The substance of the reports are gathered from information received from Government Counsel. These reports have been submitted, in camera, to the Court of Appeals for the Seventh Circuit in connection with an appeal there pending wherein this petitioner's co-indictee, John J. Brennan, has raised a similiar claim. This Petitioner requested that the appeals be consolidated, absent success. Oral argument in U.S. v. Brennan, #75-1955, is set for April 27, 1976.

CONCLUSION

Petitioner, Angelo Bartemio, respectfully urges that this court grant his petition for a writ of certiorari and reverse the order from the Court of Appeals for the Seventh Circuit which found that his pretrial motion to dismiss was not a final appealable order; yet further were this court to grant this petition it would be respectfully urged that the Solicitor General be called upon to answer how materials could be suppressed for a time period involving approximately five (5) years during which time petitioner was twice indicted, once tried and convicted and only through a series of appeals was granted retrial on grounds other than those urged in this petition. It must be stressed that at all times herein pertinent the Government was in possession of reports which they declined to make available even to this court during the pendency of Bartemio's earlier unsuccessful petition for review (95 S.Ct. 305).

Respectfully submitted,

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
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Washington, D. C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in dismissing, for lack of jurisdiction, his pretrial appeal from the denial by the district court of his double jeopardy claim.

On May 1, 1973, petitioner was convicted after a jury trial in United States District Court for the Northern District of Illinois of aiding and abetting the unlawful possession and transfer of stolen securities, in violation of 18 U.S.C. 659. He was sentenced to five years' imprisonment. The court of appeals affirmed (497 F.2d 927), and this Court denied certiorari (419 U.S. 994).

Petitioner moved under 28 U.S.C. 2255 for a new trial, contending that the government had unlawfully concealed evidence favorable to him. The district court denied relief. On appeal the government confessed error, and the court of appeals reversed (513 F.2d 634). On remand petitioner moved to dismiss the indictment. He contended that a second trial

would violate the Double Jeopardy Clause. The district court denied his motion, and petitioner appealed. The court of appeals dismissed the appeal for lack of jurisdiction (Pet. App. A).

On June 14, 1976, this Court granted certiorari in Abney v. United States, No. 75-6521, which presents the question whether the pretrial denial of a double jeopardy claim is immediately appealable. There is no reason, however, for the Court to hold this case pending disposition of Abney. Petitioner's double jeopardy argument is not even colorable. The Double Jeopardy Clause does not bar the retrial of a defendant whose conviction is set aside at his behest. United States v. Tateo, 377 U.S. 463; Forman v. United States, 361 U.S. 416, 425-426. Petitioner's conviction was set aside, by the court of appeals, at his behest. His speculation that the first trial might have ended in acquittal if it had been error-free is accordingly beside the point. Petitioner's appeal could have been dismissed as frivolous. We submit, therefore, that the Court should deny the petition in order to prevent further delay in holding petitioner's second trial for events that occurred in 1971. If petitioner should be convicted once more, he will have an opportunity to present all of his arguments, including the double jeopardy argument, to the court of appeals.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JULY 1976.

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Reply by Petitioner, Angelo Bartemio to the MEMORANDUM OF THE UNITED STATES IN OPPOSITION to this Petition for Certiorari

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Reply by Petitioner, Angelo Bartemio to the
MEMORANDUM OF THE UNITED STATES IN OPPOSITION
to this Petition for Certiorari

I

The Solicitor General opposes review of this Petition for Certiorari. However in an unrelated Petition for Certiorari (Abney -v- U.S., # 75-6521- 3rd Cir., ____ F2d____,1976) 1./ the Solicitor General requests that this Court review and decide the same single question as proffered IN THIS PETITION, to wit:

> "Whether in a federal criminal prosecution an appeal will lie from a pretrial denial of a motion to dismiss an indictment which is based upon, inter alia, grounds of double jeopardy?

II

The Bartemio Petition for Certiorari presents the question the Solicitor General desires answered by this Court in Abney, ante. Yet, the party seeking the answer from this Court eschews the suggestion that this case be heard. The Solicitor General

1./ Cert. Granted June 14, 1976(___U.S.___,1976; 96 S.CT. 2646.

suggests in his Memorandum in opposition that:

(a) Bartemio's double jeopardy claim is not even colorable;

(b) that Bartemio's conviction was set aside at his (Bartemio's) own behest;

(c) That if Bartemio is once more convicted he would then have an opportunity to present his arguments, including the double jeoprady argument, to the court of appeals 2/.

III

The Solicitor General's reasoning escapes this Petitioner. The question proffered is simple and direct. The simple asnwer is why sould Bartemio have to suffer the agonies for which the Double Jeopardy Clause of the Fifth Amendment provides protection. Recently, this Court in United States -v- Dinitz, ___ U.S.---, 96 S.ct 1075,9(1976) while reversing a decision which had granted Dinitz relief(under entirely dissimiar circumstances) 3/reviewed the purpose of the Double Jeopardy clause, stating:

> "...
>
> Underlying this constitutional safeguard is the belief that "the State with all its rescources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. Green v. United States 355 U.S. 184, 187-188,78S.Ct. 221,223,ZL.Ed2d 199,''(Dinitz,96 S/.Ct @ 1079)

IV

The conviction in Abney,ante (#75-6521) was reversed and a new trial granted(Just as Bartemio). Unlike Bartemio's case the Government had not confessed error in Abney. Bartemio SOUGHT OUTRIGHT REVERSAL OF HIS CONVICTION BASED ON GOVERNMENT SUPPRESSION OF EVIDENCE (indeed, the reason for the Government confessing error on Bartemio's second appeal and after denial of his first Petition for Cert.,419 U.S. 994)4/.

2/ Solicitor's Mem. Opp. pp2

3/ Dinitz' retained counsel caused the "mistrial" dilemma. Neither in ABNEY or BARTEMIO is a mistrial question presented.

4/ The Government agreed evidence was suppressed which could have made a difference in the outcome of Bartemio's trial, but claimed the suppression was negligent and/or inaverdant. This concession came in the Court of Appeals after an unsuccessful S2255. The Government urged that Bartemio be granted a new trial; Bartemio urged outright reversal.

V

Both in Abney and Bartemio following reversals in the Court of Appeals each moved that their indictments be dismissed on grounds of double jeopardy. In each case both the District Court and the Court of Appeals denied relief. In Bartemio the Court of Appeals for the Seventh Circuit declined to grant the jurisdictional question of review. In Abney the Court of Appeals for the Third Circuit reviewed the case but declined relief (the Third Circuit followed their earlier opinions in deciding they had jurisdiction to review the denial of pretrial relief, Cf., United States v. DiSilvio, 520 F.2d 247 (3rd Cir., 1975).

VI

An issue proffered, as part and parcel, of our double jeopardy claim is that in the case at bar prosecutorial overreaching may have sufficiently prejudiced Bartemio so that the double jeopardy clause, indeed, bars further prosecution. This Court has not squarely addressed that aspect of double jeopardy. In dicta, however, this Court has suggested that the double jeopardy clause may well bar reprosecution where prosecutorial overreaching compel the request for a mistrial. In U.S. v. Dinitz, ___U.S. ___, 96 S.Ct. 1075 (1976) inter alia, this court stated:

> "But it is evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause-the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions." (96 S.Ct. at 1080)

In U.S. v. Tateo, 377 U.S. 463 (1964) the court, while reversing the dismissal of an indictment and re-instating the same for trial stated:

> "If there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different considerations would, of course, obtain." (377 U.S. at 467, ft.nt. 3)

In United States v. Jorn, 400 U.S. 470 (1971) this Court, while barring retrial after the trial court, on its own motion declared a mistrial stated:

> "Conversely, where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred. Cf., United States v. Tateo, supra, at 468 N. 3, 84 S.Ct., at 1590; n. 11, supra." (400 U.S. at 486, ft.nt. 12)

In the case at bar the "suppression of evidence" was prosecutorial overreaching, to be sure. No mistrial could have been declared because the evidence suppressed at trial surfaced over one (1) year after trial. We deem the expressions by this Court in Dinitz, Tateo and Jorn to be apropos and worthy of realistic consideration while reviewing the 5th Amendment double jeopardy prohibition. There can be no question but that the Government suppression was a factor in Bartemio's jury trial. The Government so conceded while confessing error and seeking that Bartemio be granted a new trial (513 F.2d 634; 7th Cir., 1975).

Recently, in U.S. v. Wilson, 534 F.2d 76 (6th Cir., 1976) the court reversed an order of the District Court dismissing an indictment on double jeopardy grounds (id at 82). However, the court in Wilson directed that upon remand the District Court give full consideration to Wilson's claim that his original mistrial was provoked by prosecutorial overreaching. Wilson appears to be the first case which recognizes the decisions from this Court as standing for the proposition that retrial may well be barred if the first trial was in any way aborted because of prosecutorial misconduct (Cf., 534 F.2d at 78-80).

VII

CONCLUSION

Bartamio respectfully urges that this Court grant his Petition for Certiorari (filed in Forma Pauperis) and thereafter reverse the order and judgment of the Court of Appeals for the Seventh Circuit and remand the case to that Court with directions that the DOUBLE JEOPARDY QUESTION be fully reviewed and decided.[5/]

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5/ Delay in the prosecution of this indictment is (was) of no moment to the Government. Once they elected to retry Bartemio they were without objection to the prosecution of this appeal. In addition, a co-indictee, John J. Brennan, has yet pending and undecided an appeal wherein he is seeking a new trial (U.S. v. Brennan, Court of Appeals, 7th Circuit, Dkt. #75-1955).